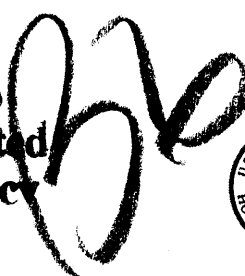


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U.S. Citizenship
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Services



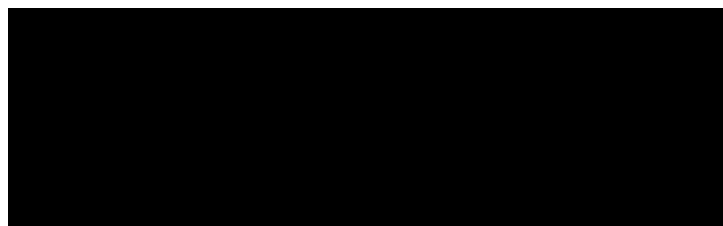
FILE: WAC 01 254 52302 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner:
Beneficiary:




PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a full charge bookkeeper. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 5, 2001. The beneficiary's salary as stated on the labor certification is \$12.64 per hour or \$26,291.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated November 6, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal tax returns for 1999 and 2000, the petitioner's 2000 quarterly wage reports (Form DE-6), and the beneficiary's Wage and Tax Statements (Forms W-2) to show wage payments to the beneficiary.

The petitioner submitted 1999 and 2000 Form 1120S, U.S. Income Tax Return for an S Corporation with the employer identification number (EIN) 33-0531751. These federal tax returns reflected ordinary losses from trade or business activities for the respective years, (\$110,098) and (\$6,245), less than the proffered wage. The director further considered the difference of current assets minus current liabilities, as reported in Schedule L of the federal tax returns, i.e., net current assets. The petitioner, without explanation, offered the same Schedule L for 2000 as for 1999, and it showed a deficit of net current assets (\$90,697), less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition. Counsel's appeal asserted that Citizenship and Immigration Services (CIS), formerly the Service or INS, must add back, and consider as net income, such financial data as depreciation, compensation of officers, salaries paid to others, and "net cash-in [sic] flow after non-cash items." No authority supported any element of this definition of income.

In a decision dated October 10, 2002, the AAO applied judicial precedent to the effect that CIS must consider net income, as federal tax returns state it, without adding back depreciation, or other, expenses. Consequently, the AAO dismissed the appeal.

On the motion to reopen (motion), received November 8, 2002, counsel submits the beneficiary's 1999-2001 Form 1040, U.S. Individual Income Tax Return, with three (3) of his 2001 Forms W-2. These meet requirements for a motion to reopen. 8 C.F.R. § 103.5(a)(2). Significantly, the foundation for the motion fails to submit, or explain the absence of, the petitioner's 2001 federal income tax return, annual report, or audited financial statement. *See* 8 C.F.R. § 204.5(g)(2). Counsel asserts that the motion attaches Forms W-2 for 1999 and 2000, but the record does not contain them. They would affect times before the priority date and be immaterial.

On motion, counsel selects one of the three Forms W-2 and avers:

[The beneficiary's] earnings are wages paid by the Petitioner and the amount is . . . \$14,596.24 for 2001. . . . The fact that the Petitioner was able to pay the beneficiary wages from 1999 to 2001 show [sic] that the petitioner does have a positive cash flow.

The 2001 W-2 in question gives the payer's EIN 33-0923047. Another one for EIN 33-0923047 reports the additional sum of \$9,464.75 paid to the beneficiary, but counsel omits any reference to it in the motion. A third one for 2001 gives the EIN 33-0055414 and identifies the payer as Ceradyne, Inc, a party otherwise unknown to these proceedings. No W-2 relates to the petitioner's EIN, 33-0531751.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The motion does not show that the petitioner paid the beneficiary wages, but only that the holder, or holders, of some other EIN did. Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

This principle also disposes of the charge that:

Further, [CIS] failed to note that there is \$456,917 in shareholder's loans listed on the Petitioner's 2000 Income Tax Return These loans are investments which show that the petitioner's business is still viable.

Counsel perceives that Schedule L of the federal tax return reports loans from shareholders as an investment, but offers no authority for this novel view of loans. In fact, Schedule L, as is customary, lists them as liabilities.

Counsel, moreover, avers that:

The petitioner has been in business since 1992 and there is no reason to suspect that it will not recoup its losses in the coming years.

In addition, the petitioner may well have a larger profit from the valued employment of the Beneficiary. In fact, the Petitioner anticipates an increase in future operations and hopes for greater profits. As a Bookkeeper, the Beneficiary will work to make the Petitioner's business as profitable as possible by maintaining financial record and analyzing accounts. As such, the Beneficiary will greatly contribute to the smooth running of the Petitioner's business and ensure continued growth.

II. CONCLUSION

It is clear that the Petitioner is a viable business with reasonable expectations of significant future growth in business and in profits.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A review of the appeal disclosed that [REDACTED] Certified Public Accountant, introduced two (2) new corporate entities and certified, in a letter, dated April 12, 2002 (expert opinion), that:

This letter is to certify that I am familiar with the financial and fiscal affairs of **OCV Retirement Home, Inc.**, a California Corporation. I am involved with the corporation in various capacities since its inception. Moreover, I was involved with its predecessor corporation, **Staff Link Inc.**

OCV Retirement Home, Inc. leases and operates the Orange Coast Villa, a licensed residential care facility, in Costa Mesa, California.

Also, the expert opinion concludes that:

Based on the information available to me and on my professional judgment, I believe that the operation of Orange Coast Villa is a viable business proposition. Its ability to hire and compensate its employees is not impaired by any adverse condition that I have knowledge of.

The petitioner has not provided evidence of the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner resorted to offers of proof from other entities, but they do not establish the petitioner's ability to pay the proffered wage.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

After a review of the federal tax returns, Forms W-2, and the expert opinion, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.